IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

4699A

No. 19,842

WESTERN STATES REGIONAL COUNCIL NO. 3, INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO,

and

WESTERN COUNCIL OF LUMBER AND SAWMILL WORKERS, AFL-CIO, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

WEYERHAEUSER COMPANY, CROWN ZELLERBACH CORPORATION, RAYONIER INCORPORATED, INTERNATIONAL PAPER COMPANY AND ASSOCIATION, *Intervenors.*

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITIONERS' REPLY BRIEF

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The Board's brief is at great pains to evade the single critical issue presented for this Court's resolution: whether the Board erred in holding *American Ship*—which validated only a single employer lockout invoked "solely" to affect an impasse in bargaining—dispositive of a concerted competitors' "solidarity" lockout to defeat a strike against an individual employer rather than to affect any bargaining impasse. We demonstrated in our initial brief (pp. 30

to 40) the two critical differences between this case and *American Ship:* (1) unlike the single employer lockout in *American Ship* this was a concerted lockout pursuant to a prior agreement binding competitors to a general shutdown and (2) also unlike *American Ship* where the employer's lockout was solely intended to affect a bargaining impasse, the Big Six lockout was intended solely as a "solidarity" protecting response to a strike against any employer. In an effort to rationalize its erroneous application of *American Ship* to this case the Board—echoed by intervenors—presents to the Court an argument both legally and factually unsound:

1. *The Legal Error.* Concerning the first critical distinction—between a single employer lockout and a concerted competitors' lockout by prior agreement—the Board chooses to say hardly anything in its presentation to this Court. Possibly the Board's reluctance to address itself to the question is due to its embarrassment over the *Detroit Newspaper* case, in which the Board has from the first appreciated the salient difference between single and concerted lockouts, and in which precisely this issue has been remanded by the Supreme Court to the Board, where it is presently pending. Indeed, the Board's pregnant silence on this central question of primary versus secondary lockout sharply contrasts with its arguments before the courts in *Detroit Newspaper.* Thus, contrary to the Board's assertion in this case that "the unions seek to avoid *American Ship* on the ground that it involved a single employer. This fact affords absolutely no distinction . . .", the Board urged in the Supreme Court in *Detroit Newspaper* (Memorandum, Nov. 1965, p. 5) that in *American Ship* "since only a single employer was involved" the Supreme Court "had no occasion to pass on the further question whether an employer in one bargaining unit could lockout to advance the position

of another employer in a different bargaining unit . . ." In like vein, the Board represented to the Sixth Circuit in its *Detroit Newspaper* Petition for Rehearing, the pertinent portion of which we set forth in the note below, that *American Ship* does not validate (particularly in the light of *Pennington*) a lockout "in support of the bargaining position of an employer in another bargaining unit."[1]

The view advanced by the National Labor Relations Board in *Detroit Newspaper* is clearly correct, for there is a salient difference between a single employer lockout and a concerted lockout by competitors pursuant to a prior agreement to a general shutdown in the event of a union strike against any employer. As we have emphasized (Brief pp.

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[1] "The National Labor Relations Board respectfully petitions this Court to grant a rehearing for the purpose of reconsidering its decision on June 3, 1965, in which it denied enforcement of the Board's order and denied the Board's motion to remand the case for reconsideration in the light of *The American Ship Building Company* v. *N.L.R.B.*, 380 U.S. 300. We believe that the intervening decision of the Supreme Court in *United Mine Workers of America* v. *James M. Pennington*, — U.S. — (33 U.S. Law Week 4520, June 7, 1965) provides support for the Board's motion that this case be remanded to the Board for further consideration.

"In *Pennington*, the Supreme Court held that it would be violative of the anti-trust laws for a union and a group of employers to conspire that the union would impose certain wages upon smaller, non-union operators, regardless of their ability to pay, for the purpose of eliminating the smaller operators from the industry. In disposing of the union's contention that it was exempt from liability under the anti-trust laws, the Court stated (33 U.S. Law Week at 4522):

> . . . we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.
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> . . . there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without

51 to 55), that difference underlies the federal antitrust norms forbidding joint action between competitors which would be legally unobjectionable if taken individually and without agreed concert of action. In any event, we feel safe in stating to this Court that *American Ship* did not validate, and the Supreme Court which decided *Pennington* would not validate, a competitors' lockout pursuant to a compact to invoke a general shutdown if the union strikes any employer. *Lockouts by agreement among competitors seeking to preclude effective union resort to a strike for fear of an industry-wide shut down in response have certainly never won approval before the Supreme Court in American Ship nor in any other ruling.*

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being strait-jacketed by some prior agreement with the favored employers.

"If, as *Pennington* holds, it is not in accord with national labor policy for a union and employer in one bargaining unit to bargain respecting conditions in another unit, it is certainly arguable that it would likewise violate that policy for an employer in one bargaining unit to lock out his employees to affect the result of bargaining in another unit. Accordingly, as it is undisputed that the News locked out its employees because the Teamsters struck to enforce bargaining demands on the Free Press—an employer in a different bargaining unit—*Pennington* suggests that there may be a basis for finding that the News lockout violated Section 8(a) (3) and (1) of the Act.

"We respectfully submit that *The American Ship Building Company* v. *N.L.R.B.*, 380 U.S. 300, on which this Court relied in denying enforcement of the Board's order here, does not reach the question presented in this case and that the issue, viewed especially in light of *Pennington*, is at the very least an open one. *American Ship* concerned a lockout by an employer solely to force the union representing his employees to accept his proposals for a contract covering that bargaining unit. The Court held:

> an employer violates neither §8(a)(1) nor §8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position. [380 U.S. at 318].

"The Court did not pass on the question of whether an employer in one bargaining unit may lockout, not directly to advance his own bargaining position, but in support of the bargaining position of an employer in another bargaining unit . . ."

2. *The Factual Error.* Desperate to squeeze within the ambit of *American Ship,* the Board stakes all upon its finding (actually an eleventh-hour gambit) that the lockout here was not just to protect the employers' solidarity against a strike of individual employers but also (as in *American Ship*) "in furtherance of the bargaining position" advanced by the Association. But for this Board finding there is literally *nothing* in thousands of pages of evidence in the way of support.

On the contrary, as our Brief demonstrates (pp. 32 to 34), far from claiming that their lockout was "in furtherance of the bargaining position" of the employers or addressed to any bargaining impasse, protection of the employers' cohesion from a "whipsaw" strike against two of the six employers was the sole purpose claimed by them for their lockout throughout the Board proceedings. That single purpose was asserted (1) in their Association Agreement, (2) in their meeting of June 5 invoking the lockout, (3) in their publicly announced reason for the lockout, (4) in their formal Answer to the General Counsel's Complaint, (5) in the opening statements of their counsel at the trial, and (6) in the repeated testimony of the employers' own witness. Not only is there no evidence to support the Board's finding that the Big Six lockout had a purpose to further the employers' bargaining position, but *all of the evidence and the judicial admissions of the companies impugn that finding.* The effort to analogize this lockout to *American Ship* on the pretense that it was invoked for bargaining purposes to effect an economic impasse simply has no evidentiary foundation on the voluminous record before this Court.

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In sum, the Board's *American Ship* premise for approving the Big Six lockout remains legally and factually un-

justified, because unlike that case economic impasse was not the reason for nor the object of this lockout, and because the crucial question whether competitors may by agreement invoke a concerted lockout to prevent an effective strike against individual employers simply was not involved in *American Ship*. The case that *did* recently present that issue to the Supreme Court was *Detroit Newspaper*, which the Circuit Court had mistakenly sought to resolve by a simplistic application of *American Ship*. The Supreme Court has appropriately vacated the lower court's ruling in *Detroit Newspaper* and remanded the case for the Board's resolution of the fundamentals (see *supra*, n. 1, p. 3).

We respectfully submit that precisely the same disposition is required here because *American Ship*—which is the Board's sole reliance—is simply irrelevant to the focal question presented in this case: whether industry lockouts by prior agreement of leading competitors to a general shutdown in answer to a strike against any employer, are consonant with the National Labor Relations Act. This case should be returned to the Board for resolution of that question contemporaneously with its resolution in the *Detroit Newspaper* remand.

Respectfully submitted,

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